SUPREME COURT, U. S.

FILED
AUG 18 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE APPELLANT

JOSEPH A. MAUN
425 Hamm Building
St. Paul 2, Minnesota

EARL SMITH
505 First National Bank Building
Mason City, Iowa

Attorneys for Appellant

Of Counsel:
BUNDLIE, KELLEY AND MAUN
425 Hamm Building
St. Paul 2, Minnesota
SMITH AND BECK
505 First National Bank Building

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of Case	4
Summary of Argument	11
Argument	14
I. The Minnesota statute imposing a tax on the appellant is in conflict with and contravenes the due process clause of the Fourteenth Amendment of the Constitution of the United States	14
II. The attempt of Minnesota to impose a tax upon the net income of the appellant, a foreign corporation, not qualified to do business in Minnesota and whose business consists exclusively of interstate commerce, violates the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States	27
Conclusion	48

CITATIONS

Page

Constitution:

Constitution of the United States, Article I, Sec. 8, Cl. 3 ..... 3, 27

Constitution of the United States, Fourteenth Amendment 3

Cases:

Adams Manufacturing Co. v. Storem, 304 U.S. 307, 58 S. Ct. 913 (1938) 32, 36

Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477 (1925) 13, 24, 28, 40, 41, 42

Ammon v. Illinois Central Ry. Co., et al., 120 Minn. 438, 139 N.W. 819 (1913) 25

Atlantic Lumber Co. v. Commissioner of Corporations and Taxation, 298 U.S. 553, 56 S. Ct. 887 (1936) 20, 33

Banik v. Chicago, M. & St. P. Ry. Co., 147 Minn. 175, 179 N.W. 899 (1920) 25

Braniff Airways v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74 S. Ct. 757 (1954) 35

Brown v. Maryland, 12 Wheat 419 (1827) 13, 28

Butler Bros. v. McColgan, 315 U.S. 501, 62 S. Ct. 701 (1942) 20

Case of the State Freight Tax, 15 Wall 232, 21 L. Ed. 146 (1873) 32

Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S. Ct. 1260 (1948) 20, 33

Charleston Federal Savings and Loan Ass'n v. Alderson, 324 U.S. 182, 65 S. Ct. 624 (1945) 2

Cheney Bros. Co. v. Commonwealth of Massachusetts, 246 U.S. 147, 38 S. Ct. 295 (1918) 28, 39, 40, 41
City of Detroit v. The Murray Corporation, —— U.S. —— (1958) Docket No. 18 46
Commonwealth v. Eastman Kodak Co., 385 Pa. 607, 124 A. 2d 100 (1956) 45
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 58 S. Ct. 436 (1938) 16
Cudahy Packing Co. v. State of Minnesota, 246 U.S. 450, 38 S. Ct. 373 (1918) 35
Field Enterprises, Inc. v. State of Washington, 47 Wash. 2d 852, 289 P. 2d 1010, 352 U.S. 806, 77 S. Ct. 55 (1956) 20
Fontenot v. John I. Hay Co., 228 La. 1031, 84 So. 2d 810 (1955) 44
Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S. Ct. 273 (1939) 20
Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274 (1946) 2, 27, 28
Frick v. Commonwealth of Pennsylvania, 268 U.S. 473, 45 S. Ct. 603 (1925) 21
General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S. Ct. 1028 (1944) 34
Great Northern Railway Co. v. State of Minnesota, 278 U.S. 503, 49 S. Ct. 191 (1929) 35
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S. Ct. 325 (1939) 32, 36
Henneford v. Silas Mason Co., 300 U.S. 577, 57 S. Ct. 524 (1937) 36
Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S. Ct. 639 (1927) 35

International Harvester Co. v. Evatt, 329 U.S. 416, 67 S. Ct. 444 (1947) 19, 20, 33
International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154 (1945) 15, 46
Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264 (1949) 20, 45
Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S. Ct. 152 (1933) 35
Kansas City M & B R.R. v. Stiles, 242 U.S. 111, 37 S. Ct. 58 (1916) 35
Lawrence v. State Tax Commission of State of Mississippi, 286 U.S. 276, 52 S. Ct. 556 (1932) 21
Louisville & J. Ferry Co. v. Kentucky, 189 U.S. 385, 23 S. Ct. 463 (1903) 14
Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 56 S. Ct. 553 (1936) 35
McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 60 S. Ct. 504 (1940) 46
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388 (1940) 36, 42
McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023 (1944) 25, 38, 45
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857 (1942) 2, 42, 43
Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1475 (1948) 2, 20
Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 72 S. Ct. 425 (1952) 2, 20, 21, 38
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396 (1954) 2, 32, 38, 48
Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 74 S. Ct. 535 (1954) 17

Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S. Ct. 575 (1934) 36
New Jersey Bell Telephone Co. v. State Board of Taxes and Assessment of New Jersey, 280 U.S. 338, 50 S. Ct. 111 (1930) 34
Nippert v. City of Richmond, 327 U.S. 416, 66 S. Ct. 586 (1946) 13, 17, 28
Norton Co. v. Department of Revenue of State of Illinois, 340 U.S. 534, 71 S. Ct. 377 (1951) 12, 16
Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S. Ct. 526 (1923) 35
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S. Ct. 432 (1949) 19
Postal Telegraph-Cable Co. v. City of Fremont, 255 U.S. 124, 41 S. Ct. 279 (1921) 35
Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 39 S. Ct. 265 (1919) 34, 35
Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 66 S. Ct. 1142 (1946) 46
Pullman Co. v. Adams, 189 U.S. 420, 23 S. Ct. 494 (1903) 35
Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S. Ct. 876 (1891) 35
Railway Express Agency, Inc. v. Commonwealth of Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954) 2, 34
Robbins v. Taxing District of Shelby County, Tennessee, 120 U.S. 489, 7 S. Ct. 592 (1887) 28, 47
Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221 (1920) ... 21
Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 57 S. Ct. 696 (1937) 35
Spector Motor Service Inc. v. O'Connor, 340 U.S. 602, 71 S. Ct. 508 (1951) 28, 34, 37, 41, 42

State of Minnesota v. Theo. Hamm Brewing Co., 247 Minn.. 486, 78 N.W. 2d 664 (1956) 29
State of Wisconsin, et al. v. J. C. Penney Co., 311 U.S. 435, 61 S. Ct. 246 (1940) 20, 22
Stockham Valves and Fittings Inc. v. T. V. Williams, as State Revenue Commissioner of State of Georgia, S. Ct. of Georgia, Docket No. 19838, Cert. Granted March 17, 1958, Docket No. 763..... 45
Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 40 S. Ct. 228 (1920) 21
Union Refrigerator Transit Company v. Kentucky, 199 U.S. 194, 26 S. Ct. 36 (1905) 11, 14, 21, 24
United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499 (1918).....30, 34, 42, 43
Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548 (1932) 35
Virginia v. Imperial Coal Sales Co., 293 U.S. 15, 55 S. Ct. 12 (1934) 35
West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390, 77 S. Ct. 1096 (1957).....12, 16
West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1378 (1946).....20, 42, 43
Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546 (1938).....31, 32, 34, 36

United States Statutes:

28 U.S.C. 1257 (2) 2
28 U.S.C. 2101 (c) 2
Title 15, U.S.C. 1 46
Title 15, U.S.C. 25 46
Title 15, U.S.C. 77 46
Title 15, U.S.C. 1012 46
Title 49, U.S.C. 60 46

State Statutes:

Minnesota Statutes, Sec. 290.03 3
Minnesota Statutes, Sec. 290.19 29
Minnesota Statutes, Sec. 512.46 25
Iowa Code 1950, Sec. 554.47 25
Wisconsin Statutes, Sec. 71.04 (3) (a) 30

Regulations:

Minnesota Income Tax Regulations §2003 (1)..... 28

Miscellaneous:

Internal Revenue Code of 1939, Sec. 710 (a) (1) as amended by Sec. 202 (a) (B) of 1943 Revenue Act 30

Anderson: *Taxation of the American Economy,* p. 303 31

Barrett: *Substance v. Form in the Applications of the Commerce Clause,* 101 Pa. L.R. 740 (1953)..... 46

Hartman: *State Taxation of Interstate Commerce,* 275-285 (1953) 46

Kimmel: *Taxes and Economic Incentives,* The Brookings Institution (1950) p. 19..... 31

IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the State Supreme Court in this action has not as yet been officially reported. The opinion is unofficially reported at 84 N.W. 2d 373. For a copy of the opinion of that Court, the dissenting opinions and Judgment, see Record pp. 221 et seq. For copies of the District Court's (trial court's) Findings of Fact, Conclusions of Law and Order for Judgment dated August 31, 1955, and Memorandum attached thereto; Order for Amended Findings of Fact, Conclusions of Law and Order for Judgment, dated October 11, 1955; and Judgment dated November 4, 1955, see Record pp. 189 et seq.

JURISDICTION

The State of Minnesota initiated proceedings to collect state income taxes, penalties and interest from Appellant taxpayer, who defended on the ground that the statute under which the tax was sought to be imposed contravened the United States Constitution. The judgment from which this appeal is taken is the judgment of the State Supreme Court entered on September 10, 1957, following the decision of that Court upholding the validity of the statute rendered on June 14, 1957. A timely petition for reargument was filed by appellant on July 25, 1957, and was denied by the Minnesota Supreme Court on August 28, 1957. Notice of Appeal was filed by appellant in the State Supreme Court on September 12, 1957.

The jurisdiction of the Supreme Court of the United States to review the decision and judgment of the State Supreme Court by direct appeal is conferred by *28 U.S.C. 1257 (2) and 2101 (c)* and is sustained by the following cases: *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954); *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 425 (1952); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946). In *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945), the court stated (p. 185):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

Probable jurisdiction was noted January 6, 1958.

QUESTIONS PRESENTED

A. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Due Process Clause of the Fourteenth Amendment of the Constitution of the United States* insofar as under its provisions the State of Minnesota seeks to impose a tax on the income of a foreign corporation whose only activity within the State of Minnesota is the solicitation of orders for sales which are consummated exclusively without and beyond the boundaries of the State of Minnesota?

B. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States* insofar as it is sought to impose a tax on the net income of a foreign corporation whose business consists exclusively of interstate commerce?

STATUTE INVOLVED

The pertinent statute involved in this action now appears as Section 290.03 of the *Minnesota Statutes.* The statutory history of this section is set forth and attached hereto as Appendix "A". Its provisions insofar as are applicable are as follows:

> "290.03. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state *or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;*" (emphasis supplied)

STATEMENT OF CASE

During the years here involved, the Northwestern States Portland Cement Company, the appellant in this proceeding, existed under and by virtue of the corporation laws of the State of Iowa and its principal offices and place of business were in Mason City, Iowa (R. 189, f. 1).

Appellant is not now and was not during the years invloved in this action authorized under the applicable statutes of the State of Minnesota to transact business in that state and it filed no income tax returns with the Commissioner of Taxation of the State of Minnesota for any of its taxable years (R. 189, f. 2). There is no indication that the State of Minnesota has ever demanded that the taxpayer qualify as a foreign corporation doing business in the State as the Minnesota Statutes require in the case where a foreign corporation is doing business within the state (see *Minnesota Statutes*, Sec. 303.03).

The State of Minnesota, acting through the Commissioner of Taxation of the State of Minnesota, prepared income tax returns for the appellant for its fiscal years 1933 through 1948 inclusive on the basis of information available to the Commissioner of Taxation and assessed the income taxes shown to be due by said returns. All of the taxes so assessed are in issue here (R. 189, f. 3). The appellant operated on a fiscal year basis with its fiscal year ending on November 30th (R. 189, f. 2).

During the years material hereto, appellant was engaged in the manufacture and sale of cement (R. 191, f. 1). Its home office and plant were located in Mason City, Iowa (R. 191, f. 1). It maintained only one office in the State of Minnesota, such office being located in the Roanoke Building in Minneapolis, Minnesota, and occupied under a lease

that was negotiated and paid for from the home office in Mason City, Iowa (R. 191, f. 1). Appellant owned no real estate in Minnesota and its only personal property in this state was its salesmen's automobiles, its office furniture and fixtures and a small amount of supplies and goodwill advertising material located in its Minneapolis sales office (R. 191, ff. 1-2). This office consisted of three small rooms and the personal property therein consisted of three desks, two filing cabinets, a typewriter and some chairs (R. 191, f. 2).

During the years involved in this proceeding, appellant had at the most no more than six employees residing and working in the State of Minnesota (R. 191, f. 3). Two salesmen and a secretary were its only employees operating out of its Minneapolis office (R. 191, f. 3). The other employees of appellant in this state operated directly out of their homes (R. 191, f. 3). All employees residing or working in Minnesota were hired by supervisory personnel at appellant's home office in Mason City, Iowa (R. 191, f. 3). No employee in the State of Minnesota had at any time any authority to hire or fire any other employee (R. 192, f. 1).

All personal property located in the State of Minnesota during the years involved was bought and paid for out of appellant's home office in Mason City, Iowa (R. 192, f. 1). All supplies except postage stamps used in Minnesota were requisitioned and obtained directly from appellant's home office at Mason City (R. 51, f. 1). None of appellant's employees in Minnesota had authority to purchase supplies other than postage stamps (R. 51, f. 1). Appellant did not maintain a bank account in Minnesota and no petty cash fund was maintained in this state (R. 192, f. 2). All salaries paid to employees in Minnesota were fixed by the sales mana-

ger in Mason City, Iowa, and were paid directly from the home office in Iowa (R. 192, f. 2).

Appellant's salesmen in Minnesota were reimbursed directly from the Mason City office for customer entertainment expense incurred by them (R. 192, f. 2). They were on a straight salary basis and received no commissions (R. 192, f. 3). Vacation policies for all employees were established by the home office at Mason City (R. 192, f. 3). The territories of its salesmen in Minnesota were allocated by the home office and no authority to reallocate these territories was given to any of appellant's employees in Minnesota (R. 192, f. 3). Appellant maintained two telephone lines in its Minneapolis office and was listed in the Minneapolis telephone directory (R. 192, f. 3). All telephone bills were paid directly by the Mason City home office (R. 193, f. 1).

The Minneapolis office was used as a forwarding center for orders that customers telephone or wrote in (R. 57, f. 2). All orders received by appellant's salesmen in the State of Minnesota were transmitted daily to the home office in Iowa where exclusively they were passed upon for acceptance or rejection (R. 57, f. 2; R. 118, f. 2). All orders received from its salesmen in Minnesota were acknowledged by it from its home office in Mason City directly to the customers (R. 60, f. 3). All sales contracts were executed on its behalf at its Mason City office and were sent directly to the customers involved (R. 64-65). No employees in Minnesota had authority to accept or reject a customer's order or to pass or approve on a customer's credit (R. 194, f. 2). Credit extensions and collections were handled exclusively by the home office in Mason City and none of its salesmen has ever been authorized to handle such matters (R. 194, f. 2). All claims for loss or damage were handled and approved exclusively also by the

home office at Mason City (R. 117, f. 3). Appellant's employees in Minnesota had no authority to make any adjustments of any kind (R. 78, f. 1).

All merchandise sold by appellant was invoiced and shipped by rail from the home office at Mason City directly to its purchaser (R. 195, f. 3). The purchasers were located in the states of Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin (R. 195, f. 3). Appellant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no such merchandise was stored or kept by it in this state (R. 195, f. 3). All price quotations were prepared and sent out directly to the customers from the home office in Mason City, Iowa (R. 73-74), and all changes in price were prepared by that office (R. 195, f. 3). Prices were quoted at the mill site rate (i.e. F.O.B.) at Mason City, Iowa, to which was then added, for the purchaser's convenience, the freight to the purchaser's place of business to reach the total cost to the purchaser (R. 76, ff. 1-2). Any freight included in excess of the actual freight charged by the carrier was refundable to the purchaser under the terms of the sales contract (Exs. 4, 5 and 8).

Appellant's activities in Minnesota consisted only of solicitation and the good will promotion incidental thereto (R. 196, ff. 2-3). All orders for merchandise were accepted or rejected exclusively at its home office in Mason City, Iowa, and all orders that were accepted were filled and delivered in interstate commerce to a common carrier by rail by appellant at and from its home office and plant in the State of Iowa (R. 196, ff. 2-3). Appellant's activities in Minnesota were an integral and inseparable part of its interstate business and all revenues received by appellant from customers located in Minnesota resulted from appellant's operations in interstate commerce (R. 194, f. 3; finding No. X).

In face of the foregoing facts the claim was made that part of the income earned by taxpayer was taxable by Minnesota. Upon the taxpayer's refusing to file returns, the Commissioner of Taxation for the State of Minnesota prepared the returns in his own office and caused them to be filed (R. 27-30). When the taxpayer failed to pay the tax shown in these returns, the State commenced this action to collect the tax (R. 1-20). In the preparation of such returns the Commissioner used the so-called three factor formula described in *Minnesota Statutes* 290.19 in determining the portion of the appellant's over-all net income for each of its fiscal years involved which was to be allocated to Minnesota and subjected to the income taxes imposed by this state (R. 190, f. 1). The three factors specified in this statutory formula are (1) the ratio of the taxpayer's sales made in Minnesota during the year to its total sales for the year wherever made; (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year (R. 190, f. 1).

For the fiscal year ending November 30, 1948, the most recent year in issue in this proceeding, the taxpayer had net income (as appears in Exhibit P) of $852,897.74, after all deductions. Part of this, that is the sum of $12,667.57, according to the schedule M (1) of that exhibit, was non-apportionable income and not claimed to be taxable by the State of Minnesota in Minnesota because it arose from rents of tangible property located outside the state, and interest. The balance of the income was claimed by the State of Minnesota to be apportionable to the State of Minnesota and was apportioned in the following manner:

COMPUTATION OF APPORTIONMENT PERCENTAGE

Tangible Property Used

Averages (1)	Within Minnesota (2)	Total (3)	Ratio of Within Minn. to Total (4)
Land		$2,396,422.20	
Equipment	$ 3,316.12	23,732.22	
Furniture and Fixtures	500.00	1,949.65	
Stocks finished, in process, etc.		311,260.23	
Supplies		607,276.65	
Total Tangible Property Used	$ 3,816.12	$3,340,640.95	.1142%
Payroll			
Total Payroll	$ 25,748.05	$1,561,973.95	1.6484%
Sales			
Total Sales	$2,314,916.18	$4,778,222.80	48.4493%
Total			50.2119%

Arithmetic Average under Sec. 290.19 Subd. 1 (1) (a) (b) (c) (Divide total of Item (d) by 3) 16.7373%

DETERMINATION OF TAXABLE NET INCOME

Total Net Income (Item 26, Page 1)	$852,897.74
Non-Apportionable Net Income (Item M-1, Col. 2 above)	12,667.57
Apportionable Income (See Instructions below)	840,230.17
Per Cent to Minnesota (Item M-3 (e) above, or Item M-3 (f) above)	16.7373%
Amount to Minnesota (P times O)	140,631.84
Minnesota Non-Apportionable Net Income (Item M-1, Col. 1 above)	
Minnesota Taxable Net Income (Enter as Item 27, Page 1)	140,631.84

The tax claimed to be assessable by the State of Minnesota for the fiscal year ending November 30, 1948, was computed on the income of $140,631.84, which amount was apportioned under the above computations to Minnesota.

The foregoing computation is typical of the method followed by the State of Minnesota for each of the years in question.

In applying this formula in computing the taxes to be assessed against the appellant for the years involved, the Commissioner treated all shipments which appellant made to Minnesota buyers as being sales made within the state without regard to the fact that all such sales were made in interstate commerce and were in every instance accepted, filled and delivered by appellant at and from its office and plant in the State of Iowa (R. 37-41). As a matter of practice appellant's solicitors in Minnesota seldom took an order. Generally orders were written up directly on the customers' purchase order form and sent into Mason City by the customer. Also in many cases they were telephoned or wired in (R. 33-41, 127, 128).

The income taxes, penalties and interest assessed against the defendant for its fiscal years ended in 1933 through 1948 and adjudged in the proceedings below to be payable by the appellant are as follows (R. 190, f. 3):

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	$ 806.48	$ 40.32	$ 512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

The Supreme Court of Minnesota, by a divided court (5 to 2), upheld the action of the Minnesota District Court in sustaining the tax against the claim that its imposition violated the due process clause of the Fourteenth Amendment, and the commerce clause (Art. I, Sec. 8, Cl. 3), of the Constitution of the United States.

SUMMARY OF ARGUMENT

I

The Minnesota Statute Imposing a Tax on the Appellant Is in Conflict With and Contravenes the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The State of Minnesota, under an income tax act enacted in 1933, in this proceeding seeks to impose a tax upon the net income of the appellant, an Iowa corporation, not qualified to do business in Minnesota, whose sole business in the State of Minnesota is that of engaging in interstate commerce. The tax sought to be levied here is for the years 1933 through 1948. As to the first year, it is now 25 years since the law was enacted. Appellant, who manufactures cement, has its plant and general office in Iowa. All of its sales are accepted or rejected in that state and all deliveries of merchandise ultimately ending up in Minnesota are made to railroad carriers in Iowa for shipment. Its sole activity in Minnesota is that of soliciting sales in interstate commerce.

Soon after the adoption of the Fourteenth Amendment this Court held that its due process clause restricted the power of a state to impose taxes on subjects not within the jurisdiction of the taxing government. Since *Union Refrigerator Transit Company v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905), this Court consistently held that any attempt to transcend these limits and to extend the taxing authority

beyond the state's jurisdiction constitutes the taking of property without due process of law and is in violation of the Fourteenth Amendment.

In case after case it has been held that mere solicitation of orders in interstate commerce does not provide the "local incidents of operation" which enable a state to tax a foreign corporation which in all other respects stays at home. See *Norton Co. v. Department of Revenue of State of Illinois,* 340 U.S. 534, 71 S. Ct. 377 (1951); *West Point Wholesale Grocery Co. v. City of Opelika,* 354 U.S. 390, 77 S. Ct. 1096 (1957). To uphold the statute under which this tax was levied would constitute a complete departure from those decisions.

II

The Attempt of Minnesota to Impose a Tax Upon the Net Income of the Appellant, a Foreign Corporation, Not Qualified to Do Business in Minnesota and Whose Business Consists Exclusively of Interstate Commerce, Violates the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

The statute here in question, by its very terms, imposes a tax upon the net income of a foreign corporation "whose business within" Minnesota "consists exclusively of * * * interstate commerce * * *".

The trial court, in an unchallenged finding, specifically determined that all of appellant's activities "were an integral part of interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

In the area of state taxation, this Court has continuously upheld the basic principle embodied in the commerce clause that its purpose is to prevent the interference with, discrim-

ination against, and undue burdening of interstate commerce. See *Brown v. Maryland*, 12 Wheat. 419 (1827); *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925).

Sound logic and reason support this view for there is the always present danger that the 48 states, each of which is a taxing district, will if left uninhibited, tax and tax and tax until such time as commerce between the states would of necessity cease.

The statute involved here is so designed that it could easily lead to multiple taxation of interstate commerce, a burden not imposed upon purely local or intrastate commerce. Even though it may be conceded that interstate commerce must pay its way, a tax upon net income produced exclusively from interstate commerce is capable of being imposed by every state which that commerce touches. Interstate commerce thus will be compelled to pay more than its way. This Court, in prior decisions, has established a pattern of permissive state taxation which will not burden interstate commerce more than local commerce. Examples of such permissive forms of taxation are the sales and use taxes which now are one of the principal sources of revenue of most states. Adherence by this Court to its prior decisions prohibiting a direct tax upon interstate commerce will have the effect of the continuance of the nationwide area of free trade essential to this country's economic welfare. A departure from those decisions will allow each state to establish its own barriers to interstate commerce by the simple expedient of imposing its own tax at its own special rate and under its own formula and there will be no such area of "free trade among the several states", as there has been in the past.

ARGUMENT

I

The Minnesota Statute Imposing a Tax on the Appellant Is in Conflict With and Contravenes the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In a union of 48 sovereign states, for the common good and benefit, it is necessary that an individual state be restricted in the exercise of its taxing power to subjects with which such state has a substantial and jurisdictionally significant relationship. Soon after the adoption of the Fourteenth Amendment this Court held that its due process clause restricted the power of a state to impose taxes on subjects not within the jurisdiction of the taxing government. Thus, in the case of *Union Refrigerator Transit Co. v. Kenutcky*, 199 U.S. 194, 26 S. Ct. 36 (1905), the court quoted with approval from *Louisville & J. Ferry Co. v. Kentucky*, 188 U.S. 385, 23 S. Ct. 463 (1903), as follows:

> "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

Since the *Union Refrigerator Transit Company* case, this Court has consistently held that any attempt to transcend these limits and to extend the taxing authority beyond the state's jurisdiction constitutes the taking of property without due process of law and is in violation of the Fourteenth Amendment.

The question of jurisdiction to impose taxation must be sharply distinguished from the question of jurisdiction to

render an *in personam* judgment by the courts of a given state. Jurisdiction to render an *in personam* judgment arises when there exists between the state and the party against whom judgment is sought certain minimum contacts so that traditional notions of fair play and substantial justice are satisfied.[1] In determining questions of jurisdiction to tax under the due process clause it must be considered whether there exists a substantial relationship between the state and the subject of the tax, and there must also be considered the relationships between the subject and other states of the Union.

The statute under which Minnesota seeks to levy this tax provides:[2]

> "An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby

---

[1] In *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1954) this Court pointed out that due process insofar as *in personam* jurisdiction is concerned required only that there be certain minimum contacts so that the service of process would not offend "traditional notions of fair play and substantial justice". It should be noted with respect to the *International Shoe* decision that the tax involved was levied under the Washington Unemployment Compensation Act on the salaries paid by the taxpayer to the solicitors it had operating in the state. In other words, as the Supreme Court carefully pointed out (326 U.S. 320):

> "The obligation which is here sued upon arose out of those very activities [which taxpayer admittedly carried on in the state]."

Under such circumstances, the Supreme Court concluded (326 U.S. 320) that it could not find an abuse of due process in the Washington court's conclusion, as quoted above, that jurisdiction existed to collect the unemployment tax on the salaries paid to taxpayer's solicitors in Washington. Such, of course, is not the situation in the case at bar since here the tax sought to be collected has no relationship to the presence in Minnesota of appellant's solicitors but is, instead, on the sales income realized by appellant on the acceptance of orders, and delivery of merchandise in the State of Iowa.

[2] For the legislative history of this statute since its first enactment in 1933, see Appendix A.

imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under Sec. 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both; * * *"

This statute purports to levy a tax on the net income of a foreign corporation engaged exclusively in interstate commerce. As applied to the taxpayer in this case, the state seeks to levy a tax on the net income of the taxpayer whose activity within the state of Minnesota is restricted solely to the solicitation of interstate sales.

In this case, as the trial court found (R. 196, ff. 1, 2), appellant taxpayer's manufacturing activity and all its contracts for the sale of its goods were executed and performed in Iowa. Its delivery of merchandise to its Minnesota customers was all to railroad carriers in Iowa. Its activity in Minnesota was, at the most, no more than "drumming activity" and was so described by the trial court (R. 199, f. 2). This activity in Minnesota consisted solely of sales promotion and in some instances solicitation of orders for acceptance out of the state.

The law is well established that the mere solicitation of orders does *not provide the "local incidents of operation" which enable a state to tax a* foreign corporation which, in all other respects, stays at home.[3]

In *Norton Co. v. Department of Revenue of State of Illinois*, 340 U.S. 534, 537, 71 S. Ct. 377 (1951), the Court stated:

"Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers

[3]See also *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S. Ct. 436 (1938); *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, 77 S. Ct. 1096 (1957).

to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023."

In *Nippert v. City of Richmond*, 327 U.S. 416, 423, 66 S. Ct. 586 (1946) the Court said:

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

In the very recent case of *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 74 S. Ct. 535 (1954) this Court struck down a Maryland excise tax on "the use, storage or consumption" of articles of commerce insofar as Maryland attempted to impose the responsibility of collection upon a Delaware corporation which made sales to Maryland residents in Delaware. Maryland sought to sustain its tax on the ground that the Delaware company's newspaper and radio advertising reached Maryland inhabitants, that sales circulars were mailed to Maryland customers, and some goods were delivered by the Delaware company's trucks to Maryland locations. (Solicitation by television or radio is merely "drumming" in the latest fashion). This Court held that the attempted imposition was without any juris-

dictional basis and therefore repugnant to the Fourteenth Amendment. The logic of this Court's reasoning there is unassailable.

> "* * * Our decisions are not always clear as to the grounds on which a tax is supported. * * *. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U.S. 344-345)

Applying these principles to the facts of the case at bar, it is clear that appellant was not subject to the taxing jurisdiction of Minnesota. There are no local incidents or activities of appellant's business which would serve as a base upon which to impose the levy here. The taxpayer remained beyond the confines of the state for all purposes, except, at the most, the mere solicitation of orders in interstate commerce. Those orders ripened into contracts of sales only when received and accepted at the home office. Delivery of the merchandise was effected by delivery to a common carrier by rail in Iowa. The merchandise never came to rest enroute.

Appellant owned and maintained no property in the State of Minnesota except some insignificant office equipment, drummer's supplies and automobiles, all of which were wholly incidental to and for the necessary use of its solicitors in their drumming work. Being an integral part of the solicitation, such items cannot constitute a basis for the tax.

The evidence in this case indicates that 48% of appellant's total shipments, deliveries of which were made to a common carrier in Iowa, ultimately came to rest in Minnesota. The majority of the Minnesota Supreme Court bottomed its decision on that fact. That court would establish a totally

new concept of trade and commerce between the states. Under the Minnesota Supreme Court's decision, if the volume of shipments from one state into a neighboring state is a substantial portion of the shipper's total volume, such commerce in effect becomes "localized" and thus "separated" from ordinary interstate commerce. The Minnesota Supreme Court did not attempt to delineate the precise volume or percentage of total shipments that would be necessary to effect this localization or separation from commerce. But, presumably, at some point, a less extensive volume or percentage of shipments between two neighboring states would be entitled to the protection of both the due process and the commerce clause. It would seem fundamental that no quantity or regularity could turn a purely interstate business into a local or intrastate one.

Had appellant been engaged in intrastate activities in Minnesota instead of confining itself solely to solicitation, such intrastate or local activities might well have been claimed by Minnesota taxing authorities as a springboard from which a tax could constitutionally have been imposed on appellant's carrying on of such local business.

Unquestionably, a tax so imposed could constitutionally be measured by appellant's net income wherever earned if properly apportioned to this state. The principle is well established that where a taxpayer is engaged in both intrastate and interstate commerce, a state may constitutionally impose a tax on the privilege of carrying on the intrastate business and may compute the amount of such tax by applying the tax rate to a fair proportion of the taxpayer's entire business done within the state, both interstate and intrastate.[4] It was so held in *International Harvester Co. v.*

[4] Such also is the rule insofar as ad valorem property taxes are concerned. See for example *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct. 432 (1949).

Evatt, 329 U.S. 416, 67 S. Ct. 444 (1947) where the taxpayer owned and operated two large factories, four branch selling establishments, four warehouses, and fourteen retail stores within the taxing state. Similarly in *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S. Ct. 701 (1942) the taxpayer maintained a wholesale distributing house, with its own stock of goods, salesmen, credit and collection services, etc. within the taxing state. A similar situation existed in *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 60 S. Ct. 273 (1939), where assembly plants were located within the taxing state. In *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246 (1940) the taxpayer had qualified as a foreign corporation to carry on a local business within the state and its local business and property interests were extensive. So, too, in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1475 (1948), and in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 62 S. Ct. 857 (1942), the actual doing of business and the ownership of extensive property within the state was not disputed. These cases are obviously no support for the State's position here.[5]

[5]See also *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, 298 U.S. 553, 56 S. Ct. 887 (1936); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260 (1948); *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S. Ct. 1264 (1949); *West Publishing Co. v. McColgan*, 328 U.S. 823, 66 S. Ct. 1378 (1946). The commerce clause is probably the only issue in the latter case, for more than solicitation was present. The salesmen were authorized to receive payments on orders taken, to collect delinquent accounts and to make adjustments. See 27 Cal. (2d) 705; 166 P. (2d) 861. *Field Enterprises, Inc. v. State of Washington*, 47 Wash. 2d 852, 289 P. 2d 1010, aff'd 352 U.S. 806, 77 S. Ct. 55 (1956) is similar to *West Publishing Co.*, except the local activities appear to be greater in the former. For example, the many salesmen (410) working out of the Seattle office of Field Enterprises could and usually did make collections, take down-payments and had authority, although not often exercised, to accept orders. The tax involved was on gross receipts which

Here there are no intrastate incidents, links or connections of any sort which constitutionally would enable Minnesota to impose this tax. As stated by this Court at pp. 392, 393, in *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952):

> "* * * a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce."

The attempt of Minnesota to exact this levy is no different than if Minnesota sought to impose an ad valorem property tax on real estate lying wholly without its borders and owned by a non-resident.[6] If the real estate were owned by a resident, then perhaps due process would not prohibit an income tax on the income from the realty for then there is some definite link in that the taxing state is affording a domicile to the person receiving the income. See *Lawrence v. State Tax Commission of State of Mississippi*, 286 U.S. 276, 62 S. Ct. 556 (1932). Conversely Minnesota could tax income if earned within the state from a local business even though the business were owned by a nonresident. See *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920). In each of the latter two instances, however, there is a def-

---

were fairly allocated so that they could not be subject to a duplicate tax by any other state. The taxpayer also had district managers with power to select and employ salesmen, which in effect amounted to managerial authority.

[6] *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905); *Frick v. Pennsylvania*, 268 U.S. 473, 45 S. Ct. 603 (1925).

finite link between the taxing state and the taxpayer which can be claimed to form a basis or subject matter for the tax.

The necessity of some such definite link was succinctly summed up in the following observation of Justice Frankfurter in *State of Wisconsin et al v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 250 (1940):

> "'Taxable event', 'jurisdiction to tax', 'business situs', 'extraterritoriality', are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

We may well ask, "What has Minnesota given this taxpayer for which it may ask a return?" First, it permitted the ownership of automobiles. For that, however, the State has received a license fee at the same rate it charges residents of the State of Minnesota. If the tax sought to be imposed here is for the ownership of those automobiles, then obviously it discriminates against a non-resident. Next, the State of Minnesota has allowed the taxpayer to lease a small office in which it has a few hundred dollars worth of office furniture on which the State has levied and collected a personal property tax. Obviously again, if the $100,000 demanded here is because of the ownership of this personal property then, too, the levy is discriminatory as against a non-resident. What next then has Minnesota given this taxpayer for

which it is entitled to collect a judgment of over $100,000? The answer is, nothing.

Here the trial court found that appellant's:

> "* * * activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce." (Finding No. X, R. 194, f. 3)

The foregoing finding has not been challenged. The Supreme Court of Minnesota in the very first sentence of its majority opinion stated: "Defendant taxpayer, a foreign corporation [*is*] engaged exclusively in interstate commerce, * * *" There are no intrastate activities. Minnesota has not afforded this taxpayer any business opportunities, protection or benefits. The commerce carried on in Minnesota is a right that this taxpayer has by virtue of its being a member of the community of states forming the United States of America.

Undoubtedly Minnesota has attempted to give extraterritorial effect to its income tax law. This follows from the fact that there is a complete lack of local or intrastate incidents upon which a tax can be based.

The Minnesota Supreme Court, in the majority opinion in this case, describes or defines the tax as follows:

> "It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative intent, or by operative effect be construed or classified as an excise, franchise, or privilege tax."

In fact the Supreme Court of Minnesota does not actually specify the nature of the tax but rather what it is not. Under the Court's own definition the levy sought to be imposed cannot be sustained as a tax in lieu of an ad valorem tax

on the property of the taxpayer located within the state, for the Court specifically says that it is not a "substitute for any other tax."

If Minnesota has afforded this taxpayer no opportunities or benefits other than those guaranteed by the Federal Constitution, and it is clear that it has not, then farther search must be had for a taxable subject if this levy is to be upheld. The only possible items upon which any kind of a tax could be imposed would be Northwest's franchise, its sales, its property or pure interstate commerce.

The company is not a Minnesota corporation nor qualified to do business in Minnesota. The Supreme Court of Minnesota quite rightly recognized that the tax could not be an excise, franchise or privilege tax for Minnesota afforded this company no franchise or privileges.

The main office, the plant, and all of the company's tangible property (with the exception of the small amount on which Minnesota levies a personal property tax), are all located in Iowa. To permit Minnesota to levy this annual tax because of that property obviously would attribute to the Minnesota taxing statutes extraterritorial application.

In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905), this Court held that it was contrary to the due process clause for the State of Kentucky to levy against a domiciliary corporation within the State of Kentucky a personal property tax upon tangible property permanently located in other states.

A case on all fours with the facts of this case is *Alpha Portland Cement Company v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925), where this Court observed:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her

borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction."

The tax here imposed would be no less repugnant to the due process clause of the Fourteenth Amendment if it were claimed that it was imposed on the sales accepted or rejected in Iowa. A very similar question involving a sales tax was considered in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023 (1944). There this Court held unconstitutional the attempted application of the Arkansas sales tax to transactions made by a Tennessee corporation with home office and place of business in Memphis. There the sales were solicited in Arkansas through traveling salesmen. There orders required acceptance by the Tennessee office and all goods were shipped from Tennessee, title passing upon delivery to the carrier in Memphis.[7]

This Court, in overturning the Arkansas tax, observed (322 U.S. 330):

"For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries."

Unquestionably to permit Minnesota to use sales made in Iowa as the subject matter of the tax would be in com-

[7]Here the same is true. The orders were accepted or rejected in Iowa and title passed upon delivery to the carrier in Mason City, Iowa. All shipments were made by rail. Under neither the Iowa nor the Minnesota statutes was it appellant's merchandise once it was delivered to the carrier. *Iowa Code* 1950, Section 554.47; *Minnesota Statute*, Section 512.46. The Minnesota Supreme Court observed in *Ammon v. Illinois Cent. Ry. Co.*, et al., 120 Minn. 438, 139 N.W. 819 (1913):

"The consignee of a shipment is presumed to be the owner of it. The possession of the carrier is presumptively his possession."

See also *Banik v. Chicago M. & St. P. Ry. Co.*, 147 Minn. 175, 179 N.W. 899 (1920).

plete disregard of the due process clause of the Fourteenth Amendment.

By process of elimination there are then no intrastate incidents, activities, subject matter, links or connections of any kind within the boundaries of the State of Minnesota.

The findings made by the trial court in this case were that the solicitation here was "an integral part" of interstate commerce.

If such solicitation alone is to constitute the subject upon which a tax is imposed, then there is no limit beyond which state taxation may expand. Solicitation today is not restricted to the old style door-to-door canvassing or to the use of solicitors going from one business to another as was done here. It may take a more intangible form. Thus it may be done exclusively through national magazine advertising such as in the case of the Book-of-the-Month Club; or perhaps by catalog, as in the case of the mail order house; or perhaps by long distance telephone, or radio, the range of which extends for thousands of miles. Today the most modern method of solicitation is through the use of national television programs originating in Hollywood and reaching into every living-room in the State of Minnesota. Will it be urged here that Minnesota can impose this tax because this taxpayer sent its selling message through solicitors rather than through the use of television beamed from without Minnesota? In each case, pure solicitation is involved and nothing more. If solicitation is to become the base for income taxation, then obviously Minnesota is not precluded by reason of due process from taxing all companies selling on a national basis whose product reaches Minnesota, even though no representatives of the company may ever step foot on Minnesota soil. Under present day marketing techniques no semblance

of commercial order among the 48 states can be maintained unless strict adherence is had to the requirements of the due process clause. With new marketing trends, incorporating expanding methods of communication, the functions of the due process clause are more important than ever before. The constantly increasing appetite of the state governments for more and more sources of revenue make even more essential that this court prevent overreaching by any state, including Minnesota.

II

The Attempt of Minnesota to Impose a Tax Upon the Net Income of the Appellant, a Foreign Corporation, Not Qualified to Do Business in Minnesota and Whose Business Consists Exclusively of Interstate Commerce, Violates the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Article I, Section 8, Clause 3 of the Constitution of the United States provides that Congress shall have the power

> "To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."

This clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force, it creates an area of trade free from interference by the states. In short, it is a limitation upon the state's authority absent implementing legislation by Congress. *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946).

The statute here in question, by its very terms, imposes a tax upon the net income of a foreign corporation "whose business within" Minnesota "consists exclusively of * * * interstate commerce * * *."

The trial court, in an unchallenged finding, specifically determined that all of appellant's activities "were an integral part of interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce" (R. 194, f. 3; R. 216, f. 3). The Minnesota Supreme Court, in its opinion stated that the trial court's findings were sustained by the evidence.

The regulations issued by the Commissioner of Taxation of the State of Minnesota and, in effect, approved by the State Supreme Court, provide in part as follows:

> "All corporations, domestic or foreign whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M.S.A. 290.03 (1)." *Minnesota Income Tax Regulations*, §2003 (1).

As applied to foreign corporations not qualified to do business in Minnesota the statute should be void on the face of it. The regulations promulgated thereunder make this even more conclusive.

In the area of state taxation, this Court has continuously upheld the basic principle embodied in the commerce clause that its purpose is to prevent the interference with, discrimination against, and undue burdening of interstate commerce.[8]

Sound logic and reason supports this view for there is the always present danger that the 48 states, each of which is a taxing district, will if left uninhibited, tax and tax and tax

---

[8] *Brown v. Maryland*, 12 Wheat. 419 (1827); *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S. Ct. 592 (1887); *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147, 38 S. Ct. 295 (1918); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946); *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925).

until such time as commerce between the states would of necessity cease.

For example, let it be assumed in this very case that this taxpayer was a Minnesota corporation with its plant in Minnesota and that it carried on its activities in Iowa in exactly the same manner as the taxpayer here carries on its activities in Minnesota. The effect then under the Minnesota income tax act would be to allocate property, payroll and sales (the three factors which Minnesota uses under its allocation formula) for 1948 as follows (Ex. P):

	Within Iowa	Total	Ratio of Within Minn. to Total
(a) Taxable Property	$ 3,816.12	$3,340,640.95	99.8858
(b) Payroll	25,748.02	1,561,973.95	98.3516
(c) Sales	None	4,778,222.80[9]	100.000
			298.2374
(e) Arithmetic average under Sec. 290.19 Subd. 1 (1) (b) (c) Minn. Satutes, equals			99.424 percent

In other words, 99.424 percent of its income would be taxed under the Minnesota law to Minnesota. As a matter of practice this is exactly what Minnesota does in such situations.[10] Yet when an Iowa corporation, with its plant, its office, and all of its sales in Iowa, engages exclusively in interstate commerce in Minnesota, this state's taxing authorities claim also the right to tax a portion of that corporation's income. That is the situation involved in this proceeding. This state of facts clearly demonstrates that a net income tax can be a real burden on interstate commerce.

[9] All sales would be allocated to Minnesota because all orders would be accepted and filled in this State. See *Minnesota Statutes* 290.19 and the Regulations promulgated thereunder. Appendix B.

[10] See *State of Minn. v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N.W. 2d 664 (1956).

Perhaps when income tax rates were insignificant, the observation made by this Court in 1918[11] that "*the difference in effect* between a tax measured by gross income and one measured by net income * * * is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is indirect or incidental," was sound. However, since 1918, a great change in rates has occurred. Then the federal tax rates on corporations was only two percent and the Wisconsin rate two percent. Now the federal rate is 52 percent. The Minnesota rate is over seven percent.

During the World War II period, which includes a number of the years involved in this very proceeding, the aggregate federal corporate normal tax, surtax and excess profits tax rate was as high as 95 percent.[12] The Minnesota rate at that time was six percent—now it is 7.3%. Some states, like Wisconsin[13] permit only a small portion of the federal tax to be deducted prior to the computation of the state tax. Minnesota permits a deduction only for federal taxes paid,[14] not those accrued. To suggest that taxes upon net income as now constituted are not a practical and real burden is not being realistic.

Furthermore, since 1918 there has occurred a significant change in the thinking of economic theorists as to the impact of a tax on net income. The traditional theory of economists

---

[11]See *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S. Ct. 499 (1918).

[12]See Section 710 (a) (1) *Internal Revenue Code of 1939*, as amended by Sec. 202 (a) (B) of the 1943 Revenue Act.

[13]Section 71.04 (3) (a) *Wisconsin Statutes*—permits the deduction only to the extent of the federal taxes paid or ten percent of the income of the corporation whichever is smaller.

[14]See *Minn. Stat.* Sec. 290.09.

was that the burden of an income tax falls on the stockholders of the more profitable firms. This reasoning, which was the accepted theory until the 1930's, assumed that prices on commodities were determined by marginal producers who made no profit and who therefore paid no income tax. This theory came under serious scrutiny in the 1930's, and the more modern economic theory now recognizes that prices are established not by the marginal companies but by the so-called representative companies as to which an income tax is a definite cost of doing business. It is now recognized that taxable profits are made up of interest on capital, return for bearing risk on capital, and residual profit, and that at least as to the first two items the tax falls in part on the cost of doing business and increases these costs. Over the long run prices are affected in any given industry by the supply of initiative capital available to that industry, which in the long run will depend upon available return after taxes. See Anderson, *Taxation of the American Economy,* page 303 et seq.; Kimmel, *Taxes and Economic Incentives,* The Brookings Institution (1950), page 19.

Even a tax upon gross receipts as heretofore upheld[15] is much less burdensome than an income tax as levied by Minnesota since, under the rules carefully prescribed by this Court, such a tax cannot be imposed by more than one state on the same income. No such protection is assured taxpayers engaged in interstate commerce in those states imposing an income tax similar to that of Minnesota. A tax such as Minnesota seeks to impose can well be applied by a number of states and the aggregate of such taxes, together with the federal income tax, could easily exceed 100% of the tax-

[15] See *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938).

payer's net income so as to result in its complete confiscation.

One hardly need dwell on the situation that would exist were the cement plant and home office of this taxpayer located in Minnesota and 48% of its product shipped to Iowa and all of the balance, i.e., 52% to Wisconsin—both border states to Minnesota. Under the three-factor formula (i.e., including property, payroll and sales ratios), Minnesota has sought to use here, Minnesota would assert the right to a tax on more than 99 percent of the income—Iowa on more than 16 percent and Wisconsin on approximately 18 percent.

This Court has time and time again[16] invalidated taxes that were so designed that they might be imposed by more than one state on the same subject matter. As Justice Stone observed (at p. 255) in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938):

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce * * *."

It certainly is apparent that a tax upon net income, as applied by Minnesota, can be imposed by every state where that commerce touches. Had this taxpayer limited its sales to the State of Iowa no question of a cumulative burden could possibly have arisen. It would not then, as strictly local commerce, have been subjected to this additional bur-

---

[16]See *Adams v. Storen*, 304 U.S. 307, 58 S. Ct. 913 (1938); *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 59 S. Ct. 325 (1939); *Case of the State Freight Tax*, 15 Wall 232, 21 L. Ed. 146 (1873); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

den which arises now solely because of the fact that it is engaged in interstate commerce. Clearly interstate commerce under this Minnesota law can be and is subjected to cumulative burdens. Taxes on net income derived solely from interstate commerce, if permitted in the manner applied by Minnesota can interfere with and place a burden on that commerce to which purely local commerce is not exposed.

The ever present danger of multiple taxation of income produced from interstate commerce is discussed by Altman and Keesling in their book entitled *Allocation of Income in State Taxation* (1950 Ed.) wherein they say (p. 14):

> "Again, a corporation doing business in several states may find that due to the use of different methods of apportionment, there will be attributed to the different states in which it does business an amount of income which in the aggregate exceeds its total income. * * *"
>
> "It is no exaggeration to say that the existing situation is serious in the extreme. It definitely requires attention and correction if state income tax laws are to be continued in effect. * * *"
>
> "* * * The present situation is sufficiently critical to require that active and positive steps be taken to prevent the possibility of the same income being subjected to tax in two or more states."

No one will argue with the right of a state to impose taxes measured by income if there are some local intrastate incidents or activities which will first constitute a valid basis or subject matter for the tax.[17] In such circumstances there is a jurisdictional compliance with due process requirements, and then local commerce as distinguished from interstate

[17] See, for example, *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, 298 U.S. 553, 56 S. Ct. 887 (1936); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260 (1948); *International Harvester Co. v. Evatt*, 329 U.S. 416, 67 S. Ct. 444 (1947).

commerce, may properly become the subject upon which the tax may be imposed.

Certainly those engaged in interstate commerce must bear their just share of state taxes—or as one former member of this Court put it, "Even interstate commerce must pay its way."[18]

However, it is submitted that interstate commerce should not be subjected to multiple burdens, nor should it pay more than its share of state taxes. This Court has on many occasions charted a course of permissive state taxation without departing from the requirements of due process and without permitting the imposition of multiple or direct burdens upon purely interstate commerce. Thus there has been upheld as not violative of the Commerce Clause, any number of state taxes, the payment of which in the final analysis obviously came out of revenues produced from interstate commerce. There, however, the taxes themselves were not upon that very commerce itself as is and must be the case here.[19]

Accordingly this Court has approved franchise taxes upon the privilege of carrying on intrastate business even though measured by values attributable to interstate busi-

[18] Justice Clark in *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259, 39 S. Ct. 265 (1919). See also *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey*, 280 U.S. 338, 351, 50 S. Ct. 111 (1930); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938).

[19] This Court in every instance of permissive state taxation first required that there be a compliance with substantive due process not found in this case. There must be some "local incidents" not "an integral part of interstate commerce" as the Court here found the facts to be (Finding No. X, R. 194, f. 3). See *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S. Ct. 499 (1918); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938); *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 64 S. Ct. 1028 (1944). See also *Railway Express Agency Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951).

ness whether the taxpayer be a domestic[20] or foreign corporation.[21] Such taxes may even be measured by net income from business done within a foreign jurisdiction.[22] So too, property may be subjected to an ad valorem tax although completely devoted to interstate commerce use, as in the case of a railroad doing exclusively an interstate business.[23] Gross earnings may be used as a measure of that tax in lieu of a direct ad valorem tax.[24] Generally, however, the real questions in cases of that kind are ones involving due process and not the commerce clause.[25]

This Court has sustained flat sum license taxes if imposed upon the intrastate portions of the business[26] and also occupation taxes as on those engaging in the business of mining,[27] generation of power,[28] or production of natural gas,[29] even though the end product immediately went into interstate commerce.

---

[20] *Kansas City M & B R.R. v. Stiles*, 242 U.S. 111, 37 S. Ct. 58 (1916).

[21] *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 57 S. Ct. 696 (1937); *Pullman Co. v. Adams*, 189 U.S. 420, 23 S. Ct. 494 (1903).

[22] *Matson Navigation Co. v. State Board of Equalization*, 297 U.S. 441, 56 S. Ct. 553 (1936).

[23] *Virginia v. Imperial Coal Sales Co.*, 293 U.S. 15, 55 S. Ct. 12 (1934).

[24] *Great Northern Railway Co. v. State of Minnesota*, 278 U.S. 503 49 S. Ct. 191 (1929); *Cudahy Packing Co. v. State of Minn.*, 246 U.S. 450, 38 S. Ct. 373 (1918).

[25] *Braniff Airways Inc. v. Nebraska, State Board of Equalization and Assessment*, 347 U.S. 590, 74 S. Ct. 757 (1954). See also *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 54 S. Ct. 152 (1933); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S. Ct. 876 (1891).

[26] *Postal Telegraph-Cable Co. v. City of Fremont*, 255 U.S. 124, 41 S. Ct. 279 (1921).

[27] *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526 (1923).

[28] *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548 (1932).

[29] *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639 (1927).

A properly apportioned gross receipts tax is not objectionable from the standpoint of the commerce clause[30] although obviously out-of-state values cannot be included as the subject of the tax.[31] In all such cases where the tax has been approved, intrastate transactions, separate from the interstate activity, served as the tax base. Taxes upon sales after the interstate commerce has ended unquestionably are valid[32] and in those situations where, because of interstate commerce clause restrictions or otherwise, a tax on sales cannot be imposed, a compensatory tax upon the use of the article in the buyers' state can be employed.[33]

It is obvious then that where local incidents, that is intrastate commerce exists, the state is not prohibited from imposing practically any kind of non-discriminatory tax. Under the doctrine of *Henneford v. Silas Mason Co.*, Minnesota here although it did not, unquestionably could have levied a compensatory use tax on the cement purchased by the Minnesota customers of this taxpayer. Had Minnesota imposed such a use tax at the usual three percent rate, it would have collected, even at the wholesale selling price, the sum of $496,047.00[34] for the years involved in this proceeding, as opposed to $67,213.45, which is the income tax sought here

[30] *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938).

[31] *Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 58 S. Ct. 913 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 59 S. Ct. 325 (1939).

[32] *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 54 S. Ct. 575 (1934); c.f. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940).

[33] *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S. Ct. 524 (1937).

[34] These figures are computed by multiplying the total sales allocated to Minnesota by three percent. The sales are found in schedule M of Ex. A to P.

(exclusive of penalties and interest).[35]

It is readily apparent then that the decisions of this Court have not deprived Minnesota nor any other state of the right to make commerce, whether interstate or otherwise, pay its way. The fact that Minnesota, for policy reasons, apparently best known to itself, has not seen fit to enact a revenue producing measure within the framework of the permissible constitutional pattern cannot form the basis for any claim to validity of the tax sought to be imposed here. Sight should not be lost of the fact that this taxpayer pays all the taxes assessed against it by the State of Iowa. This is not a case of seeking immunity from taxation. However, it is submitted that Minnesota should not be permitted to levy an exaction upon an "* * * activity which is neither derived from the state, nor within its power to forbid,"[36]—namely interstate commerce.

It would appear then that a precedent of dangerous proportions would be created were taxes of the kind here imposed permitted to stand, whereas the sources of revenue of the various states would not be shut off, by continuing to hold such taxes invalid, for this Court has left most of the field to the states. The prohibitions of the Commerce Clause should not be circumscribed as Minnesota would do. As recently as 1954, this Court, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*,[37] reaffirmed the rule that (p. 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part

[35] Thirty-three states and the District of Columbia now impose a sales and use tax, in addition to many cities, typical of which is New York City.

[36] Judge Learned Hand in *Spector Motor Service, Inc. v. Walsh*, 139 F. 2d 809, 822 (C.C.A. 2d) (1943).

[37] 347 U.S. 157, 74 S. Ct. 396 (1954).

of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In characterizing the tax here, the trial court made the following observation:

"Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both." (R. 200, f. 1)

That court could hardly have stated otherwise for the provisions of the statute make no pretense of doing otherwise than imposing a net income tax directly upon interstate commerce whether there are local incidents or intrastate activities or not.

The commerce clause is not merely a matter of historic reference. It is a restraint upon state authority that is of vital significance to the flow of business throughout the states of this union. It was adopted with good reason, for as this Court pointed out in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327-331, 64 S. Ct. 1023, 1026 (1944);[38]

"The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

There being in Minnesota no local property, no domicile and no intrastate activities, it must necessarily follow that the only possible subject matter of the tax levy here is interstate commerce itself. That was the very thing considered in *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952), where it was held that a tax, the incidence of which fell upon soliciting inter-

[38] See also *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

state business in another state, was a tax on interstate commerce itself. There a truck was sent from neighboring Mississippi into Tennessee to pick up laundry and Tennessee sought to tax that activity.[39] In determining that the tax was invalid, this Court said (at p. 395):

> "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states."

One of the early leading cases decided in this field is *Cheney Bros. Co. v. Commonwealth of Massachusetts,* 246 U.S. 147, 38 S. Ct. 295 (1918). There the taxpayer was a Connecticut corporation engaged in the manufacturing and selling of silk fabrics. It maintained a selling office in Boston with one office salesman and four other salesmen who traveled throughout the New England states. The salesmen, like those employed in Minnesota by the appellant in the case at bar, solicited and took orders subject to approval by the home office in Connecticut and the corporation shipped goods directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. The Boston office retained copies and records of orders taken, but did no bookkeeping and made no collections. The corporation did no other business in the state. In holding that Massachusetts' imposition of taxes on this corporation's net worth was repugnant to the Commerce Clause, the following observation was made (p. 148):

---

[39]As a matter of practice appellant's solicitors in Minnesota seldom took an order, for they generally were written up directly on the customers' purchase order form and sent into Mason City by the customer. Also in many cases they were telephoned or wired in (R. 127, 128). Even so, all such sales were included in estimating the volume of Minnesota sales (R. 33-41).

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause.*" (Emphasis supplied.)

Following the decision in the *Cheney* case, this Court was called upon to further consider the Massachusetts corporation excise and income tax in a factual situation almost identical to that involved in the instant case. In *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925), a New Jersey corporation engaged in the manufacturing and sale of cement, maintained an office in Boston, Massachusetts, under the charge and supervision of the district sales manager, where the corporation's correspondence and other customary sales activities in connection with the solicitation of orders were carried on. The office was used as a headquarters for traveling salesmen who solicited orders in Massachusetts and other New England states. As in the instant case, orders received by the taxpayer's Boston office were transmitted to the home office of the corporation to be accepted or rejected. All goods and invoices were sent directly to the customer. The corporation kept no sample or other merchandise in Massachusetts and its only property in that state was its office furniture and fixtures. Its salaries and office rent were paid from its home office. The corporation maintained no general bank account in Massachusetts

but it did keep an incidental account in Boston for the payment of minor expense items.

On the basis of these facts, it was held that the imposition on the taxpayer of the corporate excise and income tax involved was void as being in violation of and repugnant to the Commerce Clause of the United States Constitution. This Court stated at page 219:

> "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

In *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951), this Court re-emphasized the controlling authority of its earlier decisions in *Cheney Bros. Co. v. Massachusetts*, supra, and *Alpha Portland Cement Co. v. Massachusetts*, supra, and established beyond any doubt that a state tax upon income produced exclusively from interstate commerce is void.

There the following principles were reaffirmed (pp. 609, 610):

> "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of

capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph V. Carter and Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair portion of the taxpayer's business done within the state, including both interstate and intrastate. * * *

* * * * * * * * *

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law — McCulloch v. Maryland, supra."

In seeking to justify the validity of a tax imposed upon exclusively interstate commerce, the Minnesota Supreme Court relied upon certain language in some of the decisions of this Court during the interval between the *Cheney* and *Alpha Portland Cement* cases and the *Spector* case in 1951. More specifically such cases as *United States Glue Co. v. Oak Creek*;[40] *West Publishing Co. v. McColgan*,[41] *McGoldrick v. Berwind-White Coal Mining Co.*;[42] and *Memphis Natural Gas Co. v. Beeler*[43] were relied upon.

[40] 247 U.S. 321, 38 S. Ct. 499 (1918).
[41] 328 U.S. 823, 66 S. Ct. 1378 (1946).
[42] 309 U.S. 33, 60 S. Ct. 388 (1940).
[43] 315 U.S. 649, 62 S. Ct. 857 (1942).

Concededly this Court in the *Beeler* case did make the observation, solely as dictum, however, that a non-discriminatory tax by a state on the net income of a foreign corporation doing solely an interstate business is not prohibited. In any event, when *Spector* was decided this Court clarified its position (p. 609) as to language of *Beeler* by stating:

> "The decision in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

In *United States Glue Co. v. Oak Creek*, supra, as in the railroad cases, the taxing state accorded to the taxpayer certain privileges, over and above those growing out of the federal right to trade in interstate commerce. Wisconsin was the state of incorporation of the glue company and as such gave it its very existence including the corporate powers and privileges concomitant therewith. For that Wisconsin was entitled to its exaction. In addition to being a creature of the taxing state, the taxpayer had manufacturing plants, distribution centers and various other intrastate activities in Wisconsin, any one of which validly could be subjected to and thereby constitute the base upon which to sustain the tax there in issue. It was the same as if Iowa had imposed an income tax on this taxpayer. Comment has heretofore been made as to the inapplicability of the *West Publishing Company* case in footnote 5.

If each state be free to establish its own barriers to interstate commerce by the simple expedient of imposing its own tax, at its own special rate, and under its own formula, chaos necessarily must result and there can be no area of "free trade among the several states", a principle so jealously guarded by this Court, as well it must be, under the Constitution of the United States.

The result of sustaining the position taken by the State of Minnesota would void the interstate commerce clause. The legislatures of every state could and undoubtedly would emulate Minnesota by imposing their own measure of income tax upon all interstate business within their states regardless of whether any separate local or intrastate activity exists.[44]

This could be accomplished under the theory of this Minnesota decision merely by labeling the proposed tax a "net income" tax and, with this magic key, the hitherto forbidden door to state taxation of exclusively interstate trade and commerce would open wide. The serious and chaotic consequences of such taxation must be obvious.

The issues involved in this case are becoming of ever increasing importance today and there appears to be mounting pressure and an inclination among several of the states' highest courts to whittle away at the exclusive federal jurisdiction over interstate commerce. Louisiana,[45] and now Minnesota, have followed this trend. However, the highest courts

[44] Typical of the type of legislation that might be enacted, is a proposal to be submitted at the November 4, 1958 general election in California which would levy a tax of 46 percent on incomes over $50,000. This, together with a present 52 percent Federal rate, would result in complete confiscation, especially if more than one state taxed the same income.

[45] *Fontenot v. John I. Hay Co.*, 228 La. 1031, 84 So. 2d 810 (1955).

of Pennsylvania[46] and Georgia[47] have firmly adhered to the principles established by this Court in its interpretations of the Commerce Clause.

As a result of the conflict in these decisions, there has been much speculation about whether the mere denomination of a state tax as a "net income" or "an annual" tax (as here) rather than a "privilege" or "excise" tax which is measured by the net income will insure the validity of such tax even though its imposition is admittedly upon exclusively interstate commerce business.

It would seem unreasonable to suppose that merely changing the name of a tax would transform it from one that is invalid in its application to interstate commerce to one that is valid where no real difference exists between them other than the difference in their labels.

These so-called "different" taxes are identical in both their impact and effect. The measure of the tax and the amount sought to be collected are the same under each. The burden imposed by one is no less than that imposed by the other. In fact, only a semantic distinction exists between the two types of taxes, for in substantive operation, there is none. As stated by Justice Rutledge (at p. 666) in *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S. Ct. 1264 (1949):

> "* * * we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels."

See also *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 331, 64 S. Ct. 1023 (1944).

---

[46] *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956).

[47] *Stockham Valves and Fitting, Inc. v. T. V. Williams, as State Revenue Commissioner of the State of Georgia*, Supreme Court of Georgia, Docket No. 19838. Cert. granted March 17, 1958—Docket No. 763.

This same philosophy was expressed by Justice Black as recently as March 3 of this year in *City of Detroit v. The Murray Corporation*, —— U.S. ——, Docket No. 18 (1958), wherein he said:

> "However in passing on the constitutionality of a state tax 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' Lawrence v. State Tax Commission, 286 U.S. 276, 280. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down."

Affirmative Congressional action can solve this problem if need be, as has been suggested by some members of this Court.[48] Such legislation has been found feasible in the fields of unemployment compensation,[49] state regulation of insurance business,[50] and in the exclusion of oleomargarine[51] and prison-made goods[52] from federal regulations. The Miller-Tydings Act[53] permits fair trade price agreement as an exception to the Sherman Act in states having fair trade laws, and other acts allow concurrent state regulation of securities.[54]

---

[48] Justices Black, Frankfurter and Douglas dissenting in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189, 60 S. Ct. 504 (1940). See the same effect, *Barrett, Substance v. Form in the Applications of the Commerce Clause*, 101 Pa. L.R. 740, 749 (1953); *Hartman, State Taxation of Interstate Commerce*, 275-285 (1953).

[49] *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945).

[50] *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142 (1946), 15 U.S.C. Section 1012.

[51] Title 21 U.S.C. 25.

[52] Title 49 U.S.C. 60.

[53] Title 15 U.S.C. 1.

[54] Title 15 U.S.C. 77.

However, until such Congressional action is had, it would seem fairly obvious that the approach so far adopted by this Court has served well, for it has made possible an area of free trade among the states that has produced the highest standard of living in the world. To permit unfettered state taxation of this commerce hardly would be conducive to its continued growth.

To urge merely because of labels that a tax upon net income is any different from an excise upon net income—both of which produce identically the same tax, is to ignore realities and in the words of this Court in *Robbins v. Taxing District of Shelby County, Tennessee,* 120 U.S. 489, 7 S. Ct. 592 (1887):

> "* * * is to speak unadvisedly, and without due attention to the truth of things."

The fact that solicitation of interstate business, without more, affords no basis for jurisdiction to tax has been firmly established in the cases and has been relied upon for many years in business planning and organization. To upset this rule now would create untold confusion and uncertainty. It would make a farce of our federal protective covering and hazard the very economic existence of hundreds, if not thousands, of business organizations in the country, with harmful effects on the country's economy. In this very case, Minnesota itself apparently was of the view the tax could not validly be imposed here, for it waited for almost 20 years after the enactment of its own tax statute before even attempting to levy the tax in this case.

It would be difficult to formulate a more acceptable rule than the rule that, mere solicitation is (as the trial court here found), an integral part of interstate commence itself, and therefore does not afford a basis for imposition of a tax.

To make such jurisdiction dependent upon the extent of or the manner or the system, duration or intensity of solicitation, would completely eliminate any criteria upon which business or industry could rely. The workable rule and the rule guaranteed by the Constitution of the United States is that so long as the company confines its activities to the solicitation of interstate sales it cannot be subjected to the jurisdiction of the state to tax for to so permit it would be nothing more or less than a direct tax upon interstate commerce itself.

It has been suggested that Minnesota furnishes a civilized community within the United States to carry on this interstate commerce and therefore is entitled to a tax. That, of course, is the same historical argument that was advanced in favor of permitting the states to levy impost duties, and protective tariffs. "The net effect would be substantially to resurrect the custom barriers which the Commerce Clause was designed to eliminate."[55]

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Minnesota should be reversed.

JOSEPH A. MAUN
425 Hamm Building
St. Paul 2, Minnesota

EARL SMITH
505 First National Bank Building
Mason City, Iowa

Attorneys for Appellant

August, 1958

[55] *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

APPENDIX A

When first adopted in 1933, the pertinent provisions of the statute which is now referred to as *Minnesota Statutes*, §290.03, read as follows:

> "Sec. 3. Rate of tax—(a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in sub-section (b) hereof, computed in the manner and at the rates hereinafter provided.
>
> "(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporation; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year." *Laws, 1933, c. 405.*

The said statute was amended in 1937, to read as follows:

> "Sec. 3. Rate of tax.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> "(a) Domestic and foreign corporations whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;" *Laws, 1937, Ex. Sess. C. 49.*

The statute was amended in 1941, to read as follows:

"2394-3. Classes of taxpayers.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both." *Laws 1941, C. 550.*

An additional minor change was made in the said statute in 1945, so that it then read as follows, and now appears as Section 290.03 Minnesota Statutes:

"290.03. Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;" *Laws 1945, C. 410.*

The statute as re-enacted in 1945, is the statute in its present form.

The statute as originally adopted is found in *Minnesota Laws, 1933*, chapter 405, page 690.

The statute as first re-enacted is found in *Minnesota Laws, 1937*, Ex. Sess. c. 49, page 61.

The statute as re-enacted and amended in 1941 is found in *Minnesota Laws, 1941,* chapter 550, page 1153.

The statute as re-enacted and amended in 1945 is found in *Minnesota Laws, 1945,* chapter 410, page 787.

As appears from its certificate, the Supreme Court of Minnesota certified that the constitutionality of each enactment was called in question in the court below (R. 303).

APPENDIX B

Sec. 290.19. * * * 1. The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deductions of the kind permitted by section 290.09 so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

(1) If the business consists of the manufacture in Minnesota or within and without Minnesota of personal property and the sale of said property within and without the state, the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(a) The percentage which the sales made within this state and through from or by offices, agencies, branches or stores within this state is of the total sales wherever made:

(b) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and,

(c) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(d) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentages: 70 per cent of the percentage determined under clause (1) (a), 15 per cent of the percentage determined under clause (1) (b), and 15 per cent of the percentage determined under clause (1) (c);

* * * [Sec. 290.19, R. S.]

Regulations of the Commissioner of Taxation

Art. 19-1. *Net Income to Be Apportioned.*—The formulae prescribed by the provisions of this section shall be applied to the apportionable net income of a trade or business where the business carried on within this State is an integral part of a business carried on both within and without this State.

Art. 19-2. *Apportionment of Net Income Under Section 290.19, Subd. 1(1).*—If the business consists of the manufacture in Minnesota or within or without Minnesota of personal property and the sale of said property within and without Minnesota, the formula shall be as follows:

Under Section 290.19, Subd. 1 (1) (a) (b) (c)

$$\frac{\text{Minn. Sales}}{\text{Total Sales}} + \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + \frac{\text{Minn. Tangle Prop.}}{\text{Total Tangible Prop.}} \div 3 = \% \text{ to Minn.}$$

Using hypothetical percentages we secure a percent to Minnesota thus:

	Within Minn.	Without Minn.	Total Percent
Sales	40%	60%	100%
Payroll	50%	50%	100%
Tangible Property..	70%	30%	100%
Divide by Three. . . .3/160%			
Percent to Minnesota 53 1/3%			

In the alternative the following formula may be employed if a lesser percentage to Minnesota results by its use:

$$70\% \text{ of } \frac{\text{Minn. Sales}}{\text{Total Sales}} + 15\% \text{ of } \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + 15\% \text{ of } \frac{\text{Minn. Tang. Prop.}}{\text{Total Tang. Prop.}} = \% \text{ to Minn.}$$